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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD WAYNE RAMBO, Defendant and Appellant.	G051668 (Super. Ct. No. 13CF1207) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W. Michael Hayes, Judge. Affirmed as modified.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Annie Featherman Fraser and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Richard Wayne Rambo was convicted of one count of making criminal threats (Pen. Code, § 422, subd. (a))[1] and one count of brandishing a firearm (§ 417, subd. (a)(2)(B)). He argues the brandishing count should have been stayed subject to section 654, and that the court improperly determined he was ineligible for probation.

We agree with defendant that in this particular instance, the crime of criminal threats was incomplete until he brandished the firearm. Accordingly, the brandishing count should have been stayed pursuant to section 654. We also find the trial court properly concluded defendant was ineligible for probation. We therefore affirm the judgment as modified.

I

FACTS

As of April 2013, Juan V.[2] and defendant lived across the street from each other, in Santa Ana. One afternoon, Juan V.'s son B.V. was outside playing soccer with some neighborhood children, including J.C.[3] The soccer ball hit defendant's fence, and the children went to retrieve it. Defendant came out of his house and yelled at the children to get off his lawn, stating he wanted the "f–ing Mexicans" off his lawn. This upset B.V., who retrieved the ball and told his father, Juan V., what had happened. Defendant returned to his home. Juan V. moved his truck so the children would have more room to kick the ball, and they resumed their game.

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[1] Subsequent statutory references are to the Penal Code.

[2] To protect the privacy of the children involved, we use initials for the children, and first name and last initial for any related adults.

[3] At the time of trial in January 2015, B.V. was 11 years old and J.C. was 12 years old. B.V. was nine years old at the time of the incident, and J.C. was approximately 10 years old.

According to Juan V., a few minutes later he heard defendant saying "Goddamn it," as he approached the children. Juan V. approached defendant and asked him not to swear at the children. Defendant said the children should not be playing in the street and his yard, again using profanity and an ethnic slur. Juan V. said they were kids, and told defendant to go home and not worry about it.

At that point, an argument began, with defendant telling Juan V. to "shut the f– up." He stated he was "sick and tired of you f–ing Mexicans on my lawn." Juan V. responded that he was a "f–ing Mexican and I'm standing on your lawn and you [aren't] going to do anything about that." Defendant shoved Juan V., and Juan V. told defendant he didn't want to do this, and he should go back inside. Defendant punched him in the face, and they began fighting. Defendant fell to the ground at some point, but continued fighting.

Juan V. told defendant to stop fighting. Defendant told Juan V., "You're f–ing dead." Juan V. told defendant he was crazy and to go back inside, but at that point, he did not take defendant's threat seriously. Defendant eventually went into his home. Juan walked back toward the children. The children, at this point, were in Juan V.'s yard.

Shortly thereafter, probably less than a minute later, defendant exited his home carrying a shotgun. J.C. yelled that defendant had a gun, and when B.V. turned around, he saw defendant making a pumping motion. B.V. told Juan V., whose back was turned, that defendant had a gun, and Juan V. turned to see it pointed toward the ground. Defendant went back inside of his house. Frightened, Juan V. told the children to run, and he called the police. While on the phone with the police, defendant exited the home again with the gun wrapped in clear plastic wrap. Juan V. observed defendant opening his minivan and placing the gun in the back cargo area.

Officer Salvador Lopez of the Santa Ana Police Department responded to the scene and interviewed Juan V. and B.V. about what had transpired. Lopez found the shotgun, operable but unloaded, inside defendant's minivan.

Defendant was charged with one count of making criminal threats (§ 422, subd. (a), count one) and brandishing a firearm (§ 417, subd. (a)(2)(B)). It was further alleged that defendant, as to count one, personally used a firearm within the meaning of section 12022.5, subdivision (a). A jury convicted defendant on all counts and found the enhancement allegation true. The court sentenced defendant to four years and four months, comprised of the low term of 16 months in count one, plus a consecutive three-year consecutive term on the enhancement. As to count two, defendant was sentenced to a one-year concurrent term. Defendant now appeals.

II

DISCUSSION

Section 654

Defendant argues the trial court erred when it failed to stay the punishment on count two, brandishing a weapon, pursuant to section 654. He claims that brandishing the weapon was incidental to his intent to threaten Juan V.

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

The statute therefore "prohibits punishment for two crimes arising from a single indivisible course of conduct. [Citation.] If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once." (*People v. Perry* (2007) 154 Cal.App.4th 1521, 1525.) Whether a course of conduct is indivisible depends upon the perpetrator's intent

and objective. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19, disapproved on other grounds in *People v. Correa* (2012) 54 Cal.4th 331, 341.)

We review the trial court's determination that section 654 does or does not apply for substantial evidence. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1134-1135.) Simply stated, defendant's argument is that because Juan V. did not fear for his safety until defendant emerged from the house with the weapon, the crime of brandishing facilitated and completed the crime of making a criminal threat. Given the state of the evidence, we agree.

Section 422, subdivision (a), states: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and *thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety*, shall be punished by imprisonment . . . ." (Italics added.) Thus, the crime of making a criminal threat is not complete unless and until the victim is reasonably "in sustained fear for his or her own safety or for his or her immediate family's safety."

Juan V. testified that at the time defendant made the threat to kill him, during their physical altercation, he "didn't think he was going to follow through with anything," and did not take him seriously "at that particular moment." He did not believe he was in danger until defendant came out of the house with the weapon. Given those facts, we cannot reach any conclusion in this particular case except that there was only one course of conduct. The offense of criminal threats was not complete until defendant brandished the weapon. Accordingly, count two should have been stayed subject to section 654.

Probation Eligibility

Defendant next argues the trial court erred because it misunderstood the law when it found him presumptively ineligible for probation. Both counsel conceded this point at the sentencing hearing, and accordingly, there was no briefing or argument on this issue in the court.[4]

In relevant part, section 1203, subdivision (e)(2), states: "Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons: [¶] . . . [¶] (2) Any person who used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the crime of which he or she has been convicted." Defendant argues that his act of brandishing the weapon did not constitute use "upon a human being," within the meaning of the statute.

Defendant argues a "plain language" reading of the statute requires the perpetrator to either "assault or batter" the complaining witness with the firearm. The case he cites for this proposition, however, *People v. Alvarez* (2002) 95 Cal.App.4th 403, reaches no such conclusion. Its holding is that the statutory bar in section 1203, subdivision (e)(2), does not apply unless the defendant, rather than an accomplice, personally used the firearm. Indeed, defendant offers no citation to any case that bolsters his argument on this point.

Based on the facts in the record, we conclude defendant did use a weapon "upon a human being" within the meaning of section 1203, subdivision (e)(2). According to defendant's own argument on the applicability of section 654, the crime of criminal threats was not complete until defendant emerged from the house with the weapon. Therefore, defendant's brandishing of the weapon constituted use of that weapon on a human being in order to complete the crime of criminal threats. It is

[4] While there is a reasonable argument that either the doctrine of invited error or waiver applies here, we address the argument on its merits in the interests of justice.

irrelevant that he did not point or fire the weapon. Defendant used the weapon to scare Juan V., which constituted the crime of criminal threats. Accordingly, he "used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the crime of which he or she has been convicted." (§ 1203, subd. (e)(2).)

We therefore find the trial court did not err by finding defendant presumptively ineligible for probation, and there was no abuse of discretion.

III

DISPOSITION

The trial court is ordered to modify the judgment to reflect a stay pursuant to section 654 on count two. The clerk of the court is directed to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

MOORE, ACTING P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.